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## Corporate Aliens and Oklahoma's Alien Landownership Restrictions

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# CORPORATE ALIENS AND OKLAHOMA'S ALIEN LANDOWNERSHIP RESTRICTIONS

## I. INTRODUCTION

In 1975, the Economic Research Service of the United States Department of Agriculture issued a report concerning the regulation of alien landownership in the United States.<sup>1</sup> The authors of the report suggested that the dearth of recent cases concerning enforcement of state restrictions on alien landownership indicates one of several situations. "Either the statutes are so well known that they are customarily obeyed, or they are so well forgotten or their continuing validity is subject to such question that there have been few efforts to enforce them, even in clear cases."<sup>2</sup> The authors concluded that the latter reason "would appear to be the more likely alternative."<sup>3</sup>

In the wake of a recent opinion by the Attorney General of Oklahoma<sup>4</sup> this state has recently sought to enforce its alien landownership legislation.<sup>5</sup> In December 1979, Oklahoma Attorney General Jan Eric Cartwright filed escheat proceedings, pursuant to Oklahoma's alien land statutes, in Oklahoma County District Court against Hillcrest Investments, a Canadian corporation.<sup>6</sup> The Attorney General sought divestiture of Hillcrest's landholdings in Oklahoma. This case was recently decided by the Oklahoma Supreme Court.<sup>7</sup> Suit

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1. F. MORRISON & K. KRAUSE, STATE AND FEDERAL LEGAL REGULATION OF ALIEN AND CORPORATE LAND OWNERSHIP AND FARM OPERATION (1975).

2. *Id.* at 24.

3. *Id.*

4. Okla. Op. Att'y Gen. 79-286 (1979) (deciding, *inter alia*, that corporations are persons within the purview of the Oklahoma alien landownership statutes).

5. OKLA. STAT. tit. 60, §§ 121-127 (1971).

6. State *ex rel.* Cartwright v. Hillcrest Invs., No. 79-5599 (Okla. County Dist. Ct. Feb. 22, 1980), *appeal docketed*, No. 54906 (Okla. March 12, 1980).

7. State *ex rel.* Cartwright v. Hillcrest Invs., No. 54906 (Okla. March 10, 1981). In the lower court, Oklahoma County District Judge Carmon C. Harris rejected Opinion 79-286 finding "that the restriction on alien ownership contained in Article 22, Section 1, of the Oklahoma Constitution, applied only to natural persons and *not* to corporations." *Id.* On appeal, the Oklahoma Supreme Court decided that this interpretation was incorrect and held "that the drafters of the Oklahoma Constitution meant to include corporations within the restrictions on alien ownership provided for at Section 1 of Article 22." *Id.* The supreme court affirmed the trial court's decision in favor of Hillcrest, however, by determining that "a foreign [alien] corporation, once it has complied with the domestication procedures established under Oklahoma law, is, for the purposes of restrictions on alien land ownership, a resident of the State—and thus no longer subject to the restrictions of Article 22, Section 1, of the Oklahoma Constitution." *Id.* The dissent found this

has also been filed in federal district court by the Oklahoma State Chamber of Commerce and a business group, Oklahomans for Economic Progress, seeking to have the recent opinion declared "violative of the . . . Constitution and laws of the United States."<sup>8</sup>

The recent decision of the Oklahoma Supreme Court in *Hillcrest* effectively quiets title to millions of dollars of real estate in Oklahoma,<sup>9</sup> and may well stimulate future foreign investment in this state.<sup>10</sup> Due to the value of much Oklahoma real estate for purposes of oil and natural gas production, this decision could have a profound effect on energy-related alien investment in Oklahoma.<sup>11</sup> In *Hillcrest*, the Oklahoma Supreme Court did not reach the complex issues the case potentially raised, but rather decided it on a virtual technicality. This comment describes the developments in Oklahoma which generated the litigation and examines the issues left unresolved in *Hillcrest*.

## II. THE OKLAHOMA RESTRICTIONS

Most states have either a constitutional provision or legislation

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conclusion "unsupported by the law and logic" and remarked "[t]his Canadian corporation is not a bona fide resident of Oklahoma. It is—and always will be—an alien. Being domesticated to do business in Oklahoma does not change its legal residence." *Id.* (Simms & Doolin, J.J., dissenting). The State filed a motion for rehearing in the supreme court on March 30, 1981.

8. Chamber of Commerce v. Cartwright, No. 79-1287 (W.D. Okla. filed Dec. 6, 1979). On April 9, 1980, this action was stayed pending final determination of the *Hillcrest* case by the Oklahoma Supreme Court. See generally C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 218-19 (3d ed. 1976) (discussing the various abstention doctrines of the federal courts). On August 27, 1980, both the Oklahoma State Chamber of Commerce and Oklahomans for Economic Progress filed *amicus curiae* briefs with the Oklahoma Supreme Court in *Hillcrest*.

9. "The opinion [had] cast a cloud of uncertainty over millions of dollars worth of property in Oklahoma owned by foreign-controlled corporations." Tulsa World, Sept. 18, 1979, at 1, col. 3. One reason the opinion was potentially so consequential is that if read in light of a 1979 Oklahoma Attorney General Report entitled "Non-Resident Alien Ownership of Land in Oklahoma: Report of the Oklahoma Attorney General," title conveyed to a nonresident alien in violation of the restrictive Oklahoma legislation automatically vested in the state without a judicial proceeding. The report concludes that the Oklahoma legislation "would appear on its face to render title to land conveyed in violation thereof void and not merely voidable . . ." Opinion 79-286 also states "[t]itle to land which has been conveyed in violation of [the Oklahoma Constitution and Statutes] has escheated to the State of Oklahoma." Okla. Op. Att'y Gen. 79-286 (1979). See OKLA. CONST. art. 22, § 1; OKLA. STAT. tit. 60, § 121 (1971). See generally Barghols, *Alien Ownership of Oklahoma Urban Real Property*, 50 OKLA. B.J. 2439 (1979) (discussing the issue of title escheating ipso facto to the state).

10. See *Canadians Concerned About Land Curb*, Tulsa Tribune, Jan. 5, 1980, at 26, col. 3. Oklahoma Governor Nigh had called for "quick actions through the courts or legislature . . . to avoid drying up foreign investments in the state." Oklahoma City Times, Sept. 20, 1979, at 1-2, col. 1.

11. See Mecoy, *Canadians Have Keen Interest in Oklahoma*, Tulsa Tribune, July 4, 1980, at 1F, col. 1. "Ray Saadien a broker for Canarim Investment, claims Oklahoma is the 'hottest' state in which Canadian companies may invest. 'There must be 100 Canadian companies in Oklahoma that are exploring and developing oil in Oklahoma,' he said." *Id.*

dealing with alien ownership of land.<sup>12</sup> Oklahoma was one of a few states imposing somewhat comprehensive restrictions.<sup>13</sup> The Oklahoma Constitution states that:

No alien or person who is not a citizen of the United States, shall acquire title to or own land in this state, and the Legislature shall enact laws whereby all persons not citizens of the United States, and their heirs, who may hereafter acquire real estate in this state by devise, descent, or otherwise, shall dispose of the same within five years upon condition of escheat or forfeiture to the State. . . .<sup>14</sup>

Several statutes incorporate the constitutional provision requiring: that an alien who is not a resident of Oklahoma cannot acquire land within the state and that when a resident alien who is entitled to own land within the state lives outside the state

12. 48 U.S.C. §§ 1501-1507, 1509-1512 (1976) (Alaska & Hawaii); ALA. CONST. art. I, § 34; ALA. CODE § 35-1-1 (1975); ARIZ. REV. STAT. ANN. §§ 33-1201 to -1210 (1974) (repealed 1978); ARK. CONST. art. 2, § 20; ARK. STAT. ANN. § 50-301 (1971); CAL. CONST. OF 1879 art. I, § 20 (amended 1974); CAL. CIV. CODE § 671 (West 1954); COLO. CONST. art. III, § 27; CONN. GEN. STAT. ANN. §§ 47-57 to -58 (West 1978); DEL. CODE ANN. tit. 25, §§ 306-308 (1974); D.C. CODE ENCYCL. §§ 45-1501 to -1505 (West 1968); FLA. CONST. art. I, § 2; GA. CODE ANN. § 79-303 (1973); IDAHO CODE § 55-103 (1979); ILL. ANN. STAT. ch. 6, §§ 1-9 (Smith-Hurd 1975 & Supp. 1979); IND. CODE ANN. § 32-1-8-1 to -2 (Burns 1980); IOWA CONST. art. I, § 22; IOWA CODE ANN. § 567.1-.11 (West Supp. 1980); KAN. STAT. ANN. § 59-511 (1976); KY. REV. STAT. §§ 381.290, 381.300 (1972); LA. CIV. CODE ANN. art. 1490 (West 1952); ME. REV. STAT. ANN. tit. 33, § 451 (1964); MD. REAL PROP. CODE ANN. § 14-101 (1974); MASS. GEN. LAWS ANN. ch. 184, § 1 (West 1977); MICH. CONST. art. 10, § 5; MICH. COMP. LAWS ANN. § 554.135 (1967); MINN. STAT. ANN. § 500.221 (Supp. 1980); MISS. CODE ANN. § 89-1-23 (1972); MO. ANN. STAT. § 442.560 (Vernon Supp. 1980); MONT. REV. CODES ANN. § 1-1-109 (1979) (adopting English common law retrictions on alien landownership); NEB. CONST. art. I, § 25 (amended 1920); NEB. REV. STAT. § 111.055 (1979); N.H. REV. STAT. ANN. § 477.20 (1968), *construed in In re Estate of Constan*, 118 N.H. 166, 384 A.2d 495 (1978); N.J. STAT. ANN. § 46:3-18 (West Supp. 1980); N.M. CONST. art. II, § 22 (amended 1921); N.Y. REAL PROP. LAW § 10 (McKinney 1968); N.C. GEN. STAT. §§ 64-1 to -5 (1965 & Supp. 1979); N.D. CENT. CODE §§ 47-01-11, 47-10.1-01 to -06 (1978 & Supp. 1979); OHIO REV. CODE ANN. § 2105.16 (Baldwin 1978); OKLA. CONST. art. 22, § 1; OKLA. STAT. tit. 60, §§ 121-127 (1971); OR. REV. STAT. § 273.255 (1979); PA. STAT. ANN. tit. 68, §§ 22.24, 22.25-.32 (Purdon 1965); R.I. GEN. LAWS § 34-2-1 (1969); S.C. CONST. art. III, § 35; S.C. CODE §§ 27-13-10 to -40 (1976); S.D. COMP. LAWS ANN. §§ 43-2-9, 43-2A-1 to -7 (Supp. 1980); TENN. CODE ANN. § 64-201 (1976); TEX. REV. CIV. STAT. ANN. art. 166a (Vernon 1969); UTAH CODE ANN. § 68-3-1 (1953) (common law adopted); VT. CONST. ch. II, § 66; VA. CODE § 55-1 (1974); WASH. CONST. art. 2, § 33 (repealed 1966); WASH. REV. CODE ANN. §§ 64.16.010-.130, 64.16.150 (1966) (repealed 1967); *id.* § 64.16.140 (1966) (amended 1967); *id.* § 64.16.005 (Supp. 1980); W. VA. CODE § 36-1-21 (1966); WIS. CONST. art. I, § 15; WIS. STAT. ANN. §§ 710.01 to .02 (West 1980); WYO. CONST. art. I, § 29; WYO. STAT. §§ 34-15-101 to -103 (1977). See Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 TEMP. L.Q. 15 (1962). See also Comment, *Do We Live in Alien Nations?*, 3 CAL. W. INT'L L.J. 75, 95-111 (1972).

13. OKLA. STAT. tit. 60, §§ 121-127 (1971); MISS. CODE ANN. § 89-1-23 (1973) (nonresident aliens may hold land not longer than twenty years); CONN. GEN. STAT. ANN. § 47-58 (West 1978) (nonresident alien may hold land only for certain purposes).

14. OKLA. CONST. art. 22, § 1. This provision does not apply to Indians born in the United States, Oklahoma resident aliens, and lands owned by aliens at the time the constitution was enacted. *Id.*

for a period of five years, any lands he owns will revert to the state under proceedings instituted by the Attorney General or County Attorney.<sup>15</sup>

The opinion that generated the Hillcrest litigation,<sup>16</sup> states that the word "person" as used in the Oklahoma Constitution<sup>17</sup> and in Oklahoma's corresponding statutes<sup>18</sup> "includes bodies corporate."<sup>19</sup> Written by Assistant Attorney General John Paul Johnson, the opinion is the latest of three recent state Attorney General Opinions interpreting Oklahoma's alien landownership statutes.<sup>20</sup>

In 1975, then Attorney General Derryberry, pursuant to a request from the Director of Oklahoma's Department of Industrial Development, concluded that "a corporation or other entity may hold real estate subject to the statutes regulating that particular type of entity but upon the dissolution of such entity an alien individual may not acquire title to said real estate."<sup>21</sup> This opinion, seemingly permitted corporations to own real estate in Oklahoma without regard to alienage of the controlling persons or place of incorporation.

Next, in 1976, state representative Victor Wickersham asked Attorney General Derryberry whether it was "legal for a foreign country to acquire and hold property in the State of Oklahoma."<sup>22</sup> The Attorney General's response interpreted the alien land laws in light of the statutory provision that "[t]he word 'person,' except when used by way of contrast, includes not only human beings, but bodies politic and corporate."<sup>23</sup> Relying on this definition, the Attorney General con-

15. Note, *Constitutional Law: Are Oklahoma's Restrictions on Alien Ownership of Land Constitutional?*, 32 OKLA. L. REV. 144, 145 (1979) (footnotes omitted) (summarizing the legislation) [hereinafter cited as *Oklahoma's Restrictions*].

16. Okla. Op. Att'y Gen. 79-286 (1979). In Oklahoma, an Attorney General's Opinion is law until overruled by a court. In *Pan American Petroleum Corp. v. Board of Tax-Roll Corrections*, 510 P.2d 680 (Okla. 1973), the Oklahoma Supreme Court stated that "it is the duty of public officers . . . with notice thereof to follow the opinion of the Attorney General until relieved of such duty by a Court of competent jurisdiction or until this Court should hold otherwise." *Id.* at 681. See also Note, *Attorney General: The Effect of the Attorney General's Opinion in Oklahoma*, 28 OKLA. L. REV. 106 (1975).

17. "No alien or person who is not a citizen of the United States, shall acquire title to or own land in this state . . ." OKLA. CONST. art. 22, § 1.

18. "No alien or any person who is not a citizen of the United States shall acquire title to or own land in the State of Oklahoma . . ." OKLA. STAT. tit. 60, § 121 (1971).

19. Okla. Op. Att'y Gen. 79-286 (1979). "[A]nd such bodies do not avoid the provisions thereof by obtaining articles of domestication to transact business in the State of Oklahoma." *Id.* It is on exactly this point that the Oklahoma Supreme Court reached a different conclusion.

20. *Id.*; 9 OKLA. OP. ATT'Y GEN. 271 (1976); 7 OKLA. OP. ATT'Y GEN. 189 (1974).

21. 7 OKLA. OP. ATT'Y GEN. 189, 191 (1974).

22. 9 OKLA. OP. ATT'Y GEN. 271, 272 (1976).

23. OKLA. STAT. tit. 25, § 16 (1971).

cluded that since " 'person' . . . includes a body politic, a foreign country is, therefore, a 'person who is not a citizen of the United States' and is an alien for the purposes of these statutes."<sup>24</sup> This opinion dealt specifically with landownership by a foreign country. Nonetheless, because the statutory definition of persons includes both bodies politic and corporate,<sup>25</sup> the conclusion that corporations, like foreign countries, are included in Oklahoma's restrictive legislation is almost inescapable.

The most recent interpretation is again the result of a request from the Director of Oklahoma's Department of Industrial Development. The Director first asked whether an alien could hold title in fee simple absolute to real property in Oklahoma. He also asked if the answer to the first question would differ if the alien were a corporation.<sup>26</sup> Relying on Attorney General Derryberry's rationale in the 1976 opinion,<sup>27</sup> Attorney General Jan Eric Cartwright concluded that alien corporations could not hold title to real estate in Oklahoma, expressly withdrawing an earlier opinion to the contrary.<sup>28</sup>

The Oklahoma Attorney General's opinion primarily concerns corporations that have been incorporated outside the United States. The opinion also considers landownership by a corporation incorporated in the United States but "controlled" by non-resident alien shareholders.<sup>29</sup> The opinion expressly states that it "does not consider the status of title to land conveyed to a corporation which is controlled by alien shareholders."<sup>30</sup> Nonetheless, the opinion goes on to consider this very situation.

It is axiomatic, however, that a person cannot accomplish a purpose indirectly which is prohibited by law. Article 22, § 1, expressly prohibits acquisition of Oklahoma land by an alien. That prohibition cannot be avoided by indirectly acquiring ownership through a corporate device or other legal entity. Ownership embraces, in addition to legal title, all of the incidents and rights constituent therein. The corporate form cannot be utilized to shield one who has acquired such inci-

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24. 9 OKLA. OP. ATT'Y GEN. 271, 273 (1976).

25. Note 23 *supra* and accompanying text.

26. Okla. Op. Att'y Gen. 79-286 (1979).

27. Notes 22-24 *supra* and accompanying text.

28. "It is, therefore, the opinion of the Attorney General that Opinion 74-214, issued January 30, 1975, failed to address the questions submitted, and, accordingly should be and hereby is WITHDRAWN." Okla. Op. Att'y Gen. 79-286 (1979).

29. *Id.*

30. *Id.*

dents and rights in violation of the prohibition.<sup>31</sup> Oklahoma will, it appears, consider a corporation "alien", and within the purview of its alien land restrictions, if it is either incorporated under the laws of a foreign country or incorporated in the United States and controlled by aliens.

This aspect of the opinion is likely impossible to enforce. The impracticalities of tracing corporate ownership through various legal devices could prove insurmountable.<sup>32</sup> If the Oklahoma Supreme Court had gone beyond where it did, this portion of the recent opinion would have raised many complex legal issues. The following sections will discuss the most prominent of these.

### III. CORPORATE NATIONALITY

Because the applicability of the Oklahoma statutes depends upon whether the corporation is an alien, a threshold question in enforcement proceedings involves determination of corporate alienage.<sup>33</sup> This determination will depend upon the particular test the court adopts. "What the question demands is a search for certain criteria which determine whether a corporation is to be classified as either foreign [alien] or domestic."<sup>34</sup>

One such criterion is a corporation's place of incorporation. Under this approach a corporation can be deemed a "national" of the jurisdiction from which it obtained its charter.<sup>35</sup> This is the least diffi-

31. *Id.* See OKLA. CONST. art. 22, § 1.

32. If the nationality of shareholder test is used, [to ascertain corporate nationality] the difficulty arises of tracing ownership and voting rights through trusts, companies, arrangements and understandings. This process can be tortuous and will at the best of times result in a rather large margin of error.

...  
An additional difficulty is posed if a shareholder in a corporation which is under examination is itself a corporation. In order to decide the nationality of the corporation under review, it may be necessary to determine the nationality of the corporate shareholder.

Tedeschi, *The Determination of Corporate Nationality*, 50 AUSTL. L.J. 521, 523 (1976). See also Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 AM. J. COMP. L. 39, 52-53 (1980).

33. The term alien refers to a foreign-born resident who has not become a naturalized citizen. See *Breuer v. Beery*, 194 Iowa 243, —, 189 N.W. 717, 718 (1922); *Caparell v. Goodbody* 132 N.J. Eq. 559, —, 29 A.2d 563, 569 (1942). A corporation is not per se born nor can it become a citizen. Thus, the concept of alienage as it regards individuals does not fit regarding corporations. The phrase "corporate alienage" generally refers to whether the corporation has greater connections with the forum country or with other nations. Tedeschi, *supra* note 32, at 526. The phrase "corporate nationality" refers to the particular nation with which the corporate alien has its greatest contacts. This becomes important in deciding whether a corporate entity can claim particular treaty rights.

34. Tedeschi, *supra* note 32, at 521.

35. See *Agency of Canadian Car & Foundry Case* (United States v. Germany), Mixed

cult method of conferring alienage on a corporation.<sup>36</sup> Under this test, the corporate entity is a national of the jurisdiction in which it was metaphorically born. For example, following this approach an enterprise incorporated in Delaware would be considered a United States national although owned and controlled, perhaps exclusively, by aliens. If place of incorporation is the sole factor considered when determining corporate alienage, state restrictions on alien landownership can be easily evaded by alien-controlled corporations that choose to incorporate in this country.

The Oklahoma Attorney General's 1979 opinion suggests that in situations where the corporation is chartered in the United States but "controlled" by alien shareholders, the alienage of the shareholders will be conferred upon the corporation.<sup>37</sup> Defining the basis for corporate nationality as alien control is, however, only an initial step in determining corporate alienage. Shareownership is not necessarily synonymous with control. Corporations, in their articles of incorporation, are usually authorized to issue one or more classes of stock.<sup>38</sup> At-

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Claims Commission (1939) (found in 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 833 (1943)); D.C. CODE ENCYCL. § 45-1502 (West 1968) (determining a corporation alien if not created by or under the laws of the United States or of some state or territory of the United States); IOWA CODE ANN. § 567.1(4) (West Supp. 1980) (defining the phrase "foreign business" to mean a corporation incorporated under the laws of a foreign country); NEB. REV. STAT. § 76-406 (1976) (to own land a corporation must be incorporated under Nebraska law); WIS. STAT. ANN. § 710.02 (West 1980) (determining a corporation alien if not created by or under the laws of the United States or of some state or territory thereof). Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, Comment 1 (1971) (the domicile of a corporation is always its state of incorporation).

36. This is the least sophisticated way of determining the nationality of a corporation, in that it takes the concept of nationality of natural persons and applies it to the corporate sphere by stating that a corporation, if "born" in a jurisdiction, becomes a subject there. In this era of increased corporate mobility, the choice of the place of incorporation may be purely a matter of convenience without any intention on the part of those who manifest the corporate will to have any other connection with the jurisdiction of incorporation. The main advantage of this method is the ease with which it can be applied.

Tedeschi, *supra* note 32, at 521.

This approach is superficial since it contemplates matters of form and not of substance (who possesses the true interest in the land acquired). It enables aliens to form companies which are not "foreign" and thereby to acquire the land they wish; in many countries this method has been adopted to by-pass the statutory restrictions, e.g., in Mexico and Liberia.

Weisman, *supra* note 32, at 52. See also Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489, 1526-30 (1961). In *Hillcrest*, the court had no difficulty in determining corporate alienage. "An answer to the [corporate alienage question] is easily ascertained . . . . It is well settled that corporations formed under the laws of foreign nations are alien corporations." State *ex rel.* Cartwright v. Hillcrest Invs., No. 54906 (Okla. March 10, 1981).

37. Note 31 *supra* and accompanying text.

38. H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES, 207-14 (2d ed. 1970).



tached to each class are certain rights respecting, for example, dividends, liquidation preferences, and voting.<sup>39</sup> Voting rights are usually held by the common shareholders and are perhaps the characteristic of shareownership most equivalent to control.<sup>40</sup> Thus, aliens could hold a majority of stock in a particular corporation yet have little or no "control" because their shares are nonvoting. The converse can also occur where aliens hold a minority of stock yet because of voting and other preferences they exert more control than citizen common shareholders.<sup>41</sup>

A third test to determine corporate alienage involves "the extent of capital which has been contributed by shareholders regardless of voting rights."<sup>42</sup> Under this test, if a majority of a corporation's equity securities are owned by nonresident aliens the corporation will be deemed an alien. This method, however, does not include within the definition of alien a corporation owned forty-nine percent by a single alien and fifty-one percent by numerous United States citizens. In this situation, the alien entity, in fact, holds a controlling interest but the corporation will be classified as domestic.<sup>43</sup>

39. *Id.* at 208-11.

40. Since the shareholders elect and can remove, in certain situations, the board of directors who determine corporate policy and select the corporate officers, they arguably exert control over the corporation through this franchise. *Id.* at 410. This argument is weakened, however, by the fact that the directors are not agents of the shareholders and that after election their duty is owed to the corporation rather than its shareholders. *Id.* at 415.

41. If the nationality of shareholders test is taken to mean the proportion of voting rights exercised by shareholders, then the problem arises of defining just what is meant by the right to exercise votes. In many companies the articles of association provide for weighted voting whereby the holders of a particular class of shares (or even the holder of one particular share) may be assigned extra voting powers. Indeed, the articles may prohibit one class of shareholder from voting at general meetings at all. Such shareholders may be assigned the right to vote only at meetings of their class of shareholder. Alternatively, the articles of association may state that the holders of a particular class of shares are only entitled to vote on questions of a certain type, such as those where dissolution is imminent. The right to exercise votes at a general meeting may be granted, but subject to the limitation that they cannot be exercised on a question involving the appointment, retirement or removal of directors. Frequently, legislation does not distinguish between these different voting rights, so that the spirit of legislation may be avoided although the form is followed.

Tedeschi, *supra* note 32, at 522-23. See also Vagts, *supra* note 36, at 1531-38.

42. Tedeschi, *supra* note 32, at 522.

43. Assume that the cut-off point is forty-nine per cent, so that any corporation in which a foreigner owns more than forty-nine per cent of the shares or controls more than forty-nine per cent of the votes will be categorized as foreign. If one foreigner controls forty-nine per cent of the share or the votes and 1,000 locals control the other fifty-one per cent, then the corporation will be classified as domestic, even though the foreigner will have effective control of the corporation. Therefore, the nationality of shareholders test will not always reveal the influence which foreigners exert.

*Id.* at 523. See D.C. CODE ENCYCL. § 45-1503 (West 1968) (50 percent interest); IOWA CODE ANN. § 567.1 (West Supp. 1980) (majority interest); NEB. REV. STAT. § 76-406 (1976) (majority

Another test determines corporate alienage by considering the alienage of the directors and officers.<sup>44</sup> This test, however, has been criticized as resting on unsound assumptions concerning corporate decision-making.<sup>45</sup>

An additional method suggested to determine corporate alienage looks "for that country which would advance a claim in an international court or forum on the corporation's behalf."<sup>46</sup> This answer, however, somewhat begs the question. For example, in the *Barcelona Traction Case*<sup>47</sup> the issue before the International Court of Justice was whether Belgium had standing to assert the claims of its national shareholders.<sup>48</sup> Barcelona Traction, Light and Power Company was incorporated in Canada, doing business in Catalonia, Spain, with eighty-eight percent of its shares owned by Belgian nationals. The World Court stated that "in the particular field of diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance."<sup>49</sup> In deciding the standing issue, the World Court found

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interest); N.M. CONST. art. II, § 22 (majority interest); WIS. STAT. ANN. § 710.02 (West 1980) (corporation more than 20 percent of the stock of which is held by nonresident aliens is within purview of restrictions).

44. Another common test relates to the identity of the corporation's directors. In Norway one foreign director is sufficient to stamp the entire corporation as foreign. In Sweden, a corporation's status is determined by the headquarters of its board of directors. Similarly, in Argentina and some states of the U.S. the status of a corporation depends on the nationality of the directors.

Weisman, *supra* note 32, at 53-54.

45. Another method of classifying corporations is the "nationality of management" test. This test is based on the assumption that the everyday affairs of a corporation are controlled by directors or managers who are affected by ties of nationality. The test falls down on a number of points. First, personal loyalties can be just as easily shaped by ties of residence or domicile, which are based on a factual situation, rather than on the notional dubbing of a person as a citizen. In any case, it is doubtful whether any of these factors would significantly influence the mind of a manager so that he would put national interest above his duty to the corporation and the shareholders. Indeed, company law in many jurisdictions obliges the manager to have primary regard to the interests of the company as a whole, except in extreme cases involving breaches of the law or national security. The power of dismissal enables foreign owners to prevent managers from departing to any significant extent from this duty. The test is inappropriate when dealing with the multinational corporation where local managers' decisions can be, and often are, overruled by the parent company. In those jurisdictions in which it is possible for a director or manager to be a corporation, the problem arises of determining the nationality of such a manager. Again, one must ask whether the same test should be applied or a different one, and if so which one.

Tedeschi, *supra* note 32, at 523-24. See NEB. REV. STAT. § 76-406 (1976) (aliens cannot compose majority of corporate board of directors).

46. Tedeschi, *supra* note 32, at 525.

47. Case Concerning the Barcelona Traction, Light & Power Co., [1970] I.C.J. Rep. 4.

48. "The first question which must be asked here is whether Canada . . . is, in law, the national state of Barcelona Traction." *Id.* at 42-43.

49. *Id.* at 43.

Canadian nationality and appeared to utilize the French concept of *siège social*<sup>50</sup> looking to Barcelona Traction's place of control and the company's contacts with that forum.<sup>51</sup> It appears that if there is doubt concerning the nationality of a particular corporation, a preliminary issue in an international forum is likely to be the determination of corporate nationality. Thus, the circularity of reasoning entailed in this test makes it of little guiding value.

The concept of corporate nationality "appears to have been interjected more frequently" in French law "than in most other legal systems."<sup>52</sup> French law looks to the *siège social* or the location of the corporate "head office" or "business seat" to determine corporate nationality. The concept of *siège social* is very similar, if not identical, to the "nerve center" test utilized by American courts for determining the principal place of business of corporations for diversity jurisdiction purposes.<sup>53</sup> If it appears that strict application of the "business seat" test would produce "a fraud upon the law"<sup>54</sup> then "the French courts will look behind such designation and ascertain the real and effective head office."<sup>55</sup>

Neither the Oklahoma statutes nor the various attorney general opinions interpreting them provide sufficient criteria to guide a court in identifying which corporations are subject to the restrictions and which are not. Because of the uncertainty caused by this threshold issue, the recent interpretation would likely have deterred investment in

50. French courts seem to have formed . . . a general test by treating the location of the office designated by the corporation as its head (*siège social*) as the link between a corporation and a country which presumptively renders that country's law applicable and which establishes for choice-of-law purposes a corporate "nationality."

Note, *The Nationality of International Corporations Under Civil Law and Treaty*, 74 HARV. L. REV. 1429, 1431 (1961) [hereinafter cited as *Nationality of International Corporations*].

51. It has maintained in Canada its registered office, its accounts and its share registers. Board meetings were held there for many years; it has been listed in the records of the Canadian tax authorities. Thus a close and permanent connection has been established, fortified by the passage of over half a century. This connection is in no way weakened by the fact that the company engaged from the very outset in commercial activities outside Canada, for that was its declared object.

[1970] I.C.J. Rep. at 43.

52. *Nationality of International Corporations*, *supra* note 50, at 1430.

53. Under the "nerve center" test a corporation's principal place of business is "declared to be where the executive, personnel, advertising, public relations and other policy making departments [are] located." Note, *Federal Court Diversity Jurisdiction and the Corporation*, 8 TULSA L.J. 120, 126 (1972). See *Kelly v. United States Steel Corp.*, 284 F.2d 850, 853 (3d Cir. 1960) (wherein the phrase "nerve center" was first used); *Philip Morris, Inc. v. Sun Leasing Co.*, 371 F. Supp. 1233 (S.D.N.Y. 1974); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959).

54. *Tedeschi*, *supra* note 32, at 524.

55. Referred to as the *siège social réel et effectif*. *Id.*

Oklahoma even by corporations with only minimal alien contacts. Fearing an affirmance of the Attorney General's opinion, several Western European companies had, in fact, abandoned projects in Oklahoma.<sup>56</sup> Because the *Hillcrest* decision allows corporations with alien contacts to avoid the Oklahoma restrictions simply by filing domestication papers and paying a nominal fee, the issue of corporate alienage is not likely to be litigated in Oklahoma.

#### IV. EQUAL PROTECTION

The equal protection clause of the fourteenth amendment mandates that "[no state] shall deny to any person within its jurisdiction the equal protection of the laws."<sup>57</sup> Superimposed upon this language is "[a] complex analytical structure . . . creating dramatically different legal approaches to equal protection questions depending on the character of the classification involved and the nature of the private interest being affected."<sup>58</sup> This analytical structure has been described as "well-settled."<sup>59</sup> When considering an equal protection claim the Court decides:

[F]irst, whether [state legislation] operates to the disadvantages of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination.<sup>60</sup>

This approach has come to be called the "two-tier" approach to equal protection analysis.<sup>61</sup> The strict scrutiny of tier two is triggered if a state law either discriminates against a suspect class<sup>62</sup> or impinges

56. "[T]he [Hillcrest] case already has stalled plans by several Western European companies that were considering Oklahoma projects and sites." Frazier, *National Sentiment Against Land Holdings of Foreigners Strikes Chord in Oklahoma*, Wall St. J., July 7, 1980, at 13, col. 3.

57. U.S. CONST. amend. XIV, § 1.

58. Treiman, *Equal Protection and Fundamental Rights — A Judicial Shell Game*, 15 TULSA L.J. 183, 183-84 (1979).

59. *Maher v. Roe*, 432 U.S. 464, 470 (1977). *Contra*, Trieman, *supra* note 58, at 184 (arguing that in fact this framework is not well-settled).

60. 432 U.S. at 470 (quoting *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)).

61. *See Craig v. Boren*, 429 U.S. 190, 210-11 n.\* (1976) (Powell, J., concurring).

62. "Other than discriminations against racial and national minorities, and in some instances against resident aliens, the Court has not been willing to identify other classifications as suspect and subject to strict scrutiny." Treiman, *supra* note 58, at 193.

upon a fundamental right.<sup>63</sup> Application of strict scrutiny reverses the presumption of constitutionality that accompanies state legislation<sup>64</sup> and requires the state to show that the classification is necessary to achieve an overriding constitutionally permissible legislative purpose.<sup>65</sup> In all other situations, the classification need be only rationally related to a constitutionally permissible legislative purpose.<sup>66</sup> This latter approach is the rational basis test or tier one scrutiny.

When dealing with a corporation, an important step in analysis involves determination of the real party in interest. Arguably, the non-resident alien shareholders are the burdened class.<sup>67</sup> If the situation is viewed in this manner, with the nonresident shareholders bearing the burdens of the legislation, the court must still determine what level of scrutiny should be imposed on the state restrictions. Classifications based on alienage have in recent years been subject to strict judicial scrutiny.<sup>68</sup> In light of this it has been suggested that, as applied to alien individuals, Oklahoma's alien landownership statutes are unconstitutional.<sup>69</sup> Whether the protection of heightened scrutiny that has in certain instances invalidated legislation aimed at resident aliens applies to nonresident aliens has been discussed in several state cases.

For example, in *Lehndorff Geneva, Inc. v. Warren*,<sup>70</sup> the Supreme Court of Wisconsin applied only rational basis scrutiny in declaring constitutional a Wisconsin statute<sup>71</sup> limiting nonresident alien landownership to 640 acres. Incorporated in Texas, with all of its stock owned by nonresident West Germans, Lehndorff sought to purchase

63. *Id.* at 195-215.

64. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627-28 (1969); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

65. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967).

66. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

67. The argument is that in the interest of considering substance over form, the court should ignore the corporate entity and find the shareholders to be the real parties in interest.

68. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Graham v. Richardson*, 403 U.S. 365 (1971). *See also Maltz, The Burger Court and Alienage Classifications*, 31 OKLA. L. REV. 671 (1978).

69. When either the Oklahoma Supreme Court or United States Supreme Court is finally faced with determining the constitutionality of the Oklahoma restrictions on alien ownership of land, the proper level of judicial examination should be the strict scrutiny of the "compelling governmental interest test." Under this higher standard, it is doubtful that Oklahoma could advance an interest so compelling that it would justify the discrimination present in its alien land ownership statutes. As a result, Sections 121 and 127 of the Oklahoma Statutes would be held unconstitutional.

*Oklahoma's Restrictions*, *supra* note 15, at 151.

70. 74 Wis. 2d 369, 246 N.W.2d 815 (1976).

71. WIS. STAT. ANN. § 710.02 (West 1971).

real estate in excess of 640 acres. The Wisconsin statutes determined that a corporation was alien if twenty percent of its stock was owned by nonresident aliens. The court did not address the equal protection rights of the corporation, but deemed the nonresident shareholders as the burdened party and concluded that they "do not possess the characteristics which warrant heightened judicial solicitude and the state has acted in an area traditionally within its province."<sup>72</sup> The Wisconsin Supreme Court, however, did not address the issue of whether the protections of the Constitution extend extraterritorially.

In *Johnson v. Eisentrager*,<sup>73</sup> the United States Supreme Court stated that:

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. . . . And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guarantees—such as the due process of law of the Fourteenth Amendment.

But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act [to protect these constitutional guarantees].<sup>74</sup>

Recently, the Supreme Court of New Mexico, in denying a due process claim of nonresident alien Mexicans, remarked that "[c]learly, the plaintiffs are being subjected to hostile legislation, but as nonresident aliens they are beyond the protective reach of the equal protection clause and outside of our ability to help their cause on constitutional grounds."<sup>75</sup> These authorities, perhaps suggest that the nonresident

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72. 74 Wis. 2d at —, 246 N.W.2d at 824.

73. 339 U.S. 763 (1950).

74. *Id.* at 771 (citations omitted).

75. *Pedrazza v. Sid Fleming Contractor, Inc.*, 94 N.M. 58, —, 607 P.2d 597, 600 (1980).

shareholders are beyond the reach of constitutional protection.<sup>76</sup>

Dubbing the shareholders as the real parties in interest, however, is not consistent with the status of the corporation as a separate legal entity<sup>77</sup> and, moreover, does not accurately reflect the nature of the relationship between the corporation and its shareholders. Stockowners do not own corporate assets, but rather shares which entitle them to certain rights *vis-a-vis* the corporate entity.<sup>78</sup> The restrictive Oklahoma land legislation is aimed at the owner of the real estate and thus the shareholder who has no right or interest in the real estate should not be deemed the real party in interest in enforcement proceedings. The shareholder suffers only an indirect detriment in decreased stock value while the title holding corporate entity suffers the direct burden.<sup>79</sup>

The extent of constitutional rights possessed by a corporation is a question the Court has yet to adequately address.<sup>80</sup> Corporations, over vigorous dissent, have been determined "persons" within the meaning

76. See generally Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 642 (1976).

Some courts have sought to justify a distinction between resident and nonresident aliens in the language of the fourteenth amendment, which guarantees equal protection only to persons "within [the] jurisdiction" of the particular state. They argue that a nonresident, not being present within the state, is not subject to its jurisdiction and therefore cannot claim constitutional protection. Such logic should fail even in formal terms, because the alien is in fact being subjected to the jurisdiction by implementation of the prohibition. Moreover, a nonresident alien admitted to the United States on a tourist visa might personally appear in the adjudicating tribunal and thus subject himself to the state's jurisdiction in every sense of the word.

*Id.* (footnotes omitted).

77. See generally Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979 (1971).

78. See Mainord v. Sharp, 569 P.2d 546 (Okla. 1977) (shareholder in corporation has no title to corporate assets); Cooke v. Tankersley, 199 Okla. 634, 189 P.2d 417 (1948) (holding that title to corporate assets is in the corporation and not in the shareholders); Princeton Min. Co. v. First Nat'l Bank, 7 Mont. 530, 19 P. 210 (1888) (owners of corporate stock have no interest in corporate real estate). See also Ky. Op. Att'y Gen. 77-566 (1977) (deciding that because a corporation is a legal entity distinct from its shareholders, the property of a corporation, the shares of which are partially or wholly owned by a nonresident alien are not subject to Kentucky restrictions); Ky. Op. Att'y Gen. 79-161 (1979) (real property owned by firm incorporated in the United States, the shares of which are owned partially or wholly by aliens, is not subject to the Kentucky restrictions).

79. The World Court in the Barcelona Traction Case recognized that "a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as a result of the situation of the company." Case Concerning the Barcelona Traction, Light & Power Co., [1970] I.C.J. Rep. 4, 37. When dealing with a close corporation, however, delination between corporate ownership and personal ownership, perhaps, emphasizes form over substance. See note 67 *supra*.

80. For example, recently the Court failed to address this issue in the context of the first amendment. In First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), the Court said, "we need not survey the outer boundaries of the Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment." *Id.* at 777.

of the fourteenth amendment.<sup>81</sup> Because of this, after a corporation has been classified as an alien within the purview of the Oklahoma restrictions, unique equal protection problems arise. Whether a corporation enjoys the same measure of constitutional equality as an individual is largely an open question. There is language in some older cases to the effect that corporations may claim protection under the fourteenth amendment to the same extent as individuals.<sup>82</sup> This language, however, predates the current approach to equal protection analysis and is probably of little value.

The recent cases involving the alien classification<sup>83</sup> suggest that the characteristics which warrant strict scrutiny are individual characteristics and thus, state legislative classifications involving corporations would probably only be accorded minimal scrutiny.<sup>84</sup> Under the less

81. *WHYY v. Glassboro*, 393 U.S. 117, 121 (1968) (Black, J., dissenting); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576 (1949) (Douglas, J., dissenting); *Connecticut Gen. Co. v. Johnson*, 303 U.S. 77, 83 (1938) (Black, J., dissenting); *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886). See U.S. CONST. amend. XIV, § 1.

82. "A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against subsequent application to it of state law." *Connecticut Gen. Co. v. Johnson*, 303 U.S. 77, 79-80 (1938).

83. *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572 (1976); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971).

84. The rights protected by the higher test in equal protection doctrine have been basic human rights: either protection from racial and religious discrimination, as in the case of the suspect classifications, or protection of first amendment rights, as in the fundamental freedoms cases. Although these rights may have proprietary elements, they are not primarily rights of an economic nature. Indeed, the lower-level test is sometimes imprecisely characterized as a test for economic and social legislation. The statutes that have been struck down as unconstitutionally discriminating on the basis of alienage adversely affected the ability to survive—through welfare benefits, employment by the state, and eligibility for a profession—of persons permanently residing in the United States and for most purposes indistinguishable from American citizens. Inasmuch as land ownership seems equally basic to such persons, as applied to them, state statutes restricting ownership of land are almost certainly also unconstitutional. Many states have recognized this by providing full or partial exemptions from their laws for resident aliens.

But what about the alien investor who is not a resident [or the alien corporation whether resident or not] and is making an investment purely for economic motives? It is difficult to classify his claims in the same category with a welfare claimant's bid for medical assistance or a permanent resident's effort to enter a gainful profession. It is, indeed, difficult to categorize his claim as one of fundamental concern. Although he is clearly a member of a minority group, he is not part of an "isolated minority" meriting special judicial protection, for he, unlike the permanent resident alien who has abandoned his homeland, can expect the diplomatic support of his national government. Thus, despite the broad language in some of the cases, his claim may be reduced to one judged by the "lower" constitutional standard. Under this standard, legislation restricting his ownership of land is likely to be upheld against equal protection. There is clearly a rational relationship between the legislative classification, excluding aliens, and its ostensible immediate purpose, exclusion of alien influence from the state. Whether this purpose is one that the states may legitimately pursue is a question of substantive due process and of the exclusivity of the federal foreign relations and commerce powers. . . .

*Morrison*, *supra* note 76, at 642-43 (footnotes omitted).



stringent test, "at a minimum the classification must bear a rational relationship to [a permissible] legislative purpose."<sup>85</sup>

The United States Supreme Court has never specifically ruled that state statutes which deny aliens landownership are unconstitutional.<sup>86</sup> The Court, however, has not addressed the issue since 1948. In *Oyama v. California*,<sup>87</sup> the Court struck down a law which provided that agricultural land would escheat to the state whenever it was transferred with the intention of evading California's alien landownership restrictions.<sup>88</sup> The law prohibited ownership of land by an alien ineligible for citizenship. Intent was determined by presuming that whenever the alien provided the consideration for the transfer, evasion of the law was the primary motive.<sup>89</sup> Mr. Oyama, a resident ineligible for citizenship, sought to transfer his land to his native American son. California applied its prohibition to this transfer. Four concurring Justices thought the application denied Mr. Oyama equal protection of the laws.<sup>90</sup> The majority, however, held that the son's rights were violated because the classification was one of national origin and thus subject to strict scrutiny.<sup>91</sup> The majority did not reach the question of the father's equal protection rights.<sup>92</sup>

In *Takahashi v. Fish & Game Commission*,<sup>93</sup> the Court invalidated a California statute<sup>94</sup> which denied aliens commercial fishing licenses. In support of its legislation, California cited older cases which had upheld state restrictions on alien landownership.<sup>95</sup> Justice Black, writing

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85. Treiman, *supra* note 58, at 187. "The Court in several cases has declared certain purposes to be constitutionally impermissible, despite their possible importance. Deferring in-migration of indigents is an impermissible purpose. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969). Racial discrimination or segregation, for its own sake is constitutionally impermissible. [*In re Griffiths*, 413 U.S. 717, 722 n.8 (1973).]" Treiman, *supra* note 58, at 187 n.22. The arguable purpose of this legislation is to restrict alien landownership because it is "within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens." *Terrace v. Thompson*, 263 U.S. 197, 220-21 (1923). See generally Weisman, *supra* note 32, at 42-48 (cataloging seven grounds for restricting alien acquisition of land).

86. In fact, a group of 1923 cases upheld state restrictions on alien landownership. *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923).

87. 332 U.S. 633 (1948).

88. CAL. GEN. LAWS ANN. act 261 (Deering 1944, Supp. 1945) (repealed 1956) (found in 332 U.S. at 635).

89. 332 U.S. at 636.

90. *Id.* at 647, 650 (Black & Douglas, J.J., concurring; Murphy & Rutledge, J.J., concurring).

91. *Id.* at 640.

92. *Id.* at 647.

93. 334 U.S. 410 (1948).

94. *Id.* at 413.

95. *Id.* at 422 & n.8.

for the majority, questioned the "continued validity of those cases" and decided they were not controlling since they "were supported on reasons peculiar to real property."<sup>96</sup> He determined that any alleged proprietary interest of California in the fish off its coast was a "slender reed" on which to base the classification.

*Oyama* and *Takahashi* are the last word from the Supreme Court regarding state laws barring alien landownership. The decisions are over thirty years old and neither resolves the issue.

## V. TREATIES

Treaties made under the authority of the United States are the supreme law of the land, are binding on the states, and override inconsistent state legislation.<sup>97</sup> Application of the Oklahoma restrictions to corporations, in certain situations, might contravene provisions in commercial treaties entered into by the United States. To the extent that the Oklahoma statutes are inconsistent with rights granted under a treaty of the United States they are unenforceable.

Treaties are similar to a contract between separate sovereign nations.<sup>98</sup> Because of the nature of the parties, however, some of the concepts involved in contract law are perhaps inapplicable regarding treaties.<sup>99</sup> Since treaties are binding only upon the signatories, each application of the Oklahoma restrictions would potentially raise different treaty rights. The United States, however, has entered into a genre of treaties generally known as treaties of friendship, commerce, and navigation or "FCN" treaties.<sup>100</sup> Many of the provisions in these

96. *Id.* at 422.

97. *Clark v. Allen*, 331 U.S. 503, 508 (1947); *Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Detenorio v. Lightsey*, 589 F.2d 911 (5th Cir. 1979). See U.S. CONST. art. VI, cl. 2.

98. H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 281-82 (2d ed. 1976).

99. For example, in the past, the concepts of overreaching and duress, which are contract defenses were not recognized regarding treaties.

The traditional rule did not invalidate a treaty because of the use of any force against a state in the treaty's conclusion. International law did not permit a denunciation of a treaty for the reason that it was imposed. The actual consent of states was not required in the creation of binding international agreements.

Malawer, *Imposed Treaties and International Law*, 7 CAL. W. INT'L L.J. 5, 164 (1977).

100. See, e.g., Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation, April 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as Japanese Treaty]; Treaty of Friendship, Commerce, and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-West Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593 [hereinafter cited as West German treaty]. See generally Morrison, *supra* note 76, at 658-59 n.n. 225 & 226 (citing 40 treaties of friendship, commerce, and navigation); see also Walker, *Provisions on Companies in United States*

treaties are similar, if not identical.

In *Lehndorff Geneva, Inc. v. Warren*,<sup>101</sup> Lehndorff Geneva argued that the restrictive Wisconsin legislation "denies rights granted to it under a 'Treaty of Friendship, Commerce and Navigation' (FCN) between the United States and West Germany and is therefore unconstitutional under Article VI, United States Constitution."<sup>102</sup> The Wisconsin Supreme Court considered article VII of the treaty. "Each party reserves the right to limit the extent to which aliens may establish, acquire interests in, or carry on enterprises engaged within its territories in communications, air or water transport, taking and administering trusts, banking involving depository functions, or the exploitation of land or other natural resources. . . ." <sup>103</sup> The court decided that the authority to limit "exploitation of land" authorized "restrictions on the use of land not applicable to nationals," and by implication allowed restrictions on alien landownership.<sup>104</sup>

The implications of Lehndorff Geneva's Texas incorporation were never discussed in the case. Arguably, the treaty between the United States and West Germany required recognition of Lehndorff Geneva's Texas incorporation thereby rendering it an American national and not subject to the restrictions imposed by the Wisconsin legislation. The treaty's definitional section requires that "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their judicial status recognized within the territories of the other party."<sup>105</sup> Thus, the treaty between the United States and West Germany apparently requires application of the place of incorporation test of corporate nationality. An identical provision has been so interpreted in two recent cases concerning the 1953 Treaty of Friendship, Commerce, and Navigation between the United States and Japan.<sup>106</sup>

In *Spiess v. C. Itoh & Co.*,<sup>107</sup> defendant Itoh-America argued that the 1953 treaty provided American subsidiaries of Japanese corpora-

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*Commercial Treaties*, 50 AMER. J. INT'L L. 373 (1956); Walker, *Modern Treaties of Friendship, Commerce, and Navigation*, 42 MINN. L. REV. 805 (1958).

101. 74 Wis.2d 369, 246 N.W.2d 815 (1976).

102. *Id.* at —, 246 N.W.2d at 818 (footnotes omitted). See U.S. CONST. art. VI, cl. 2.

103. 74 Wis. 2d at —, 246 N.W.2d at 818. (quoting West German Treaty, *supra* note 100, art. VII, para. 2).

104. 74 Wis. 2d at —, 246 N.W.2d at 819.

105. West German Treaty, *supra* note 100, art. XXV, para. 5.

106. Japanese Treaty, *supra* note 100, art. XXII, para. 3.

107. 469 F. Supp. 1 (S.D. Tex. 1979).

tions an absolute right to hire managerial, professional and other specialized personnel "irrespective of American law proscribing racial discrimination in employment."<sup>108</sup> The United States District Court decided that it need not reach this issue since defendant Itoh-America had no standing to raise rights granted under the treaty. The court arrived at this conclusion by looking to the treaty's definitional section,<sup>109</sup> which requires recognition of the "juridical status" of companies formed by Japanese citizens under American law.<sup>110</sup> The court concluded, "[g]iven the Treaty's own definitional terms, Itoh-America is a company of the United States for purposes of the interpretation of Article VIII(1). Thus, it can claim no direct protection under Article VIII(1), which applies only to companies of one party within the territories of the other party."<sup>111</sup>

Thus, for the purposes of the treaty at least, corporate nationality is determined by place of incorporation. Itoh-America then, because incorporated in New York, was an American company. Since American companies had no standing to raise rights granted under the treaty, Itoh-America had no standing to raise the treaty as a defense to its discriminatory hiring practices.

In *Avigliano v. Sumitomo Shoji America, Inc.*<sup>112</sup> the issue raised was identical to that in *Spiess*. A United States District Court was asked to decide whether Sumitomo could "invoke the aegis of the Treaty as sanction for its employment practices."<sup>113</sup> The court, relying on *Spiess* and an older interpretation of the 1953 Japanese-American Treaty in *United States v. R.P. Oldham*,<sup>114</sup> decided that "Sumitomo is a domestic corporation and as such has neither standing nor need to invoke the aegis of the Treaty."<sup>115</sup>

Both of these decisions were made in the face of an opinion letter by the Department of State<sup>116</sup> urging a contrary interpretation of the treaty. The State Department saw "no grounds for distinguishing be-

108. *Id.* at 2. See Japanese Treaty, *supra* note 100, art. VIII, para. 1.

109. Japanese Treaty, *supra* note 100, art. XXII. "Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party." *Id.* para. 5.

110. 469 F. Supp. at 2.

111. *Id.* at 9.

112. 473 F. Supp. 506 (S.D.N.Y. 1979).

113. *Id.* at 509.

114. 152 F. Supp. 818 (N.D. Cal. 1957).

115. 473 F. Supp. at 513.

116. Letter from Lee R. Marks, Deputy Legal Advisor, Department of State to Abner W. Siball, General Counsel, Equal Employment Opportunity Commission (October 17, 1978).

tween subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on choice of organizational form.”<sup>117</sup> Although interpretations of treaty construction by the executive branch should be accorded great weight,<sup>118</sup> because the State Department failed to support its position with “analysis or reasoning”<sup>119</sup> and because the opinion letter failed to consider the definitional section of the treaty, both courts concluded that the Department of State opinion letter did not warrant a different result.<sup>120</sup>

These cases probably do not suggest that treaties of friendship, commerce, and navigation require Oklahoma to recognize the place of incorporation as the test for corporate nationality. They do suggest that the test of corporate nationality applied depends upon the purpose for which a designation of corporate nationality is being sought. The *Spiess* and *Sumitomo* cases determine that for purposes of standing under FCN treaties, place of incorporation is the test. For other purposes, however, different tests may apply.

For “treaty-trader” purposes the test of corporate nationality is different. Many of the various FCN treaties have provisions authorizing nationals of the particular signatory to enter the United States as treaty-traders “for the purpose of carrying on trade between the two Parties and engaging in related commercial activities. . . .”<sup>121</sup> In order to qualify for such status the potential treaty-trader’s employer must have the nationality of the treaty country, or be principally owned by individuals having the nationality of the treaty country.<sup>122</sup> The Department of State has issued guidelines to this regulation providing that “[t]he nationality of the employing firm is determined by those persons who own more than 50% of the stock of the employing corporation ‘regardless of place of incorporation.’ ”<sup>123</sup> Adoption of the treaty-trader test was urged on the courts in both *Spiess* and *Sumitomo*. Both courts declined to adopt that test. “The fact that nationality is determined by a different standard for other purposes cannot alter the

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117. 473 F. Supp. at 511.

118. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1960).

119. 473 F. Supp. at 511.

120. *Id.* at 511-12 & n.12.

121. West German Treaty, *supra* note 100, art. II, para. 1.

122. See 22 C.F.R. § 41.40 (1980).

123. 469 F. Supp. at 6.

clearly stated test of the treaty itself."<sup>124</sup>

There appears to be no restriction upon the states in these treaties requiring adoption of a particular test of corporate nationality. When applying their alien landownership restrictions to corporate entities the states appear free, for the purpose of that legislation, to adopt whatever test of corporate nationality they desire.

Another feature of these treaties, however, may be important. Many of them grant what has come to be known as most favored nation status. This status requires that alien nationals of the foreign signatory be granted the most favorable treatment afforded any alien in the United States.<sup>125</sup> If the United States confers, by treaty, or executive agreement, most favored nation status on nation *A*, then nationals of *A* are entitled to the same panoply of rights granted nationals of nations *X*, *Y*, and *Z* combined. This formula might have important implications in certain instances. The key to this argument is that nationals of Argentina are entitled under an 1853 treaty with the United States to acquire "property of every sort and determination."<sup>126</sup> The 1853 treaty thus appears to confer upon Argentine nationals the right to own real estate in the United States, a right which must also be granted to holders of most favored nation status.

This loophole, however, is probably of limited application. Often the conference of most favored nation status is limited to specific matters. For instance, a typical clause will grant most favored nation treatment in matters of commerce.<sup>127</sup> Arguably, implicit in these clauses is the right to own land if it is necessary to carry on commerce. The fact, however, that most treaties explicitly recognize a state's right to restrict alien ownership of real property undermines this argument.<sup>128</sup> Thus, only in situations where most favored nation status is conferred across-the-board will the right of landownership granted Argentine nationals come into play.

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124. *Id.*; 473 F. Supp. at 512.

125. See Morrison, *supra* note 76, at 660.

126. Treaty of Friendship, Commerce, and Navigation, July 27, 1853, United States-Argentina, art. IX, 10 STAT. 1005, T.S. No. 5.

127. See Note, *The Rising Tide of Reverse Flow: Would a Legislative Breakwater Violate U.S. Treaty Commitments?*, 72 MICH. L. REV. 551, 576 & n.97 (1974).

128. "The term 'commerce' is not defined, but the scope of the items expressly covered (e.g. tariffs, entry of ships into harbors, and commercial travelers) indicates that 'commerce' refers principally to matters of trade between the signatory nations, and not to investment involving stock ownership [or landownership]." *Id.* at 576 & n.98.

## VI. CONCLUSION

Without addressing many of the issues potentially raised, the Oklahoma Supreme Court has effectively nullified the Oklahoma restrictions as they pertain to corporate aliens. This comment has addressed the most prominent issues left unresolved in the *Hillcrest* decision in the context of the recent Oklahoma developments. Depending on the facts and circumstances of the particular case and the particular state legislation and federal treaty involved, different issues are potentially raised.

As foreign investment in the United States increases,<sup>129</sup> the issue of alien landownership, both corporate and individual, will increasingly be before the courts. Though probably economically unwise and practically unenforceable, state restrictions on alien landownership as applied to corporate aliens neither violate the Constitution of the United State nor, in most applications, rights conferred by federal treaty.

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129. *Id.* at 551-52 & n.3.